

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of Chapter 3-131
Hawaii Administrative Rules
October 31, 2002

SUMMARY

1. §3-131-1 to 3-131-3 are amended.
2. §3-131-6 is amended.
3. §3-131-7 is a new section.
4. Chapter 131 is compiled.

HAWAII ADMINISTRATIVE RULES

TITLE 3

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 131

PROCUREMENT VIOLATIONS

§3-131-1	Definitions
§3-131-2	Parceling
§3-131-3	Procurement violations
§3-131-4	Civil and criminal penalties
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§3-131-1 Definitions. Definitions are in section 103D-104, HRS. The following definitions are also applicable to terms used in this chapter:

"After-the-fact" means a request for approval, unless the context requires otherwise, for a procurement made in violation of proper procedures.

"Parceling" means the artificial division or intentional division of a purchase of same, like, or related items of goods, services, or construction into several purchases of smaller quantities, in order to evade the statutory competitive requirements.

"Reviewing officer" means the chief procurement officer, the head of a purchasing agency, or a designee above the level of a procurement officer, who has been delegated in writing by the chief procurement officer or head of a purchasing agency, the authority and responsibility to review procurement violations. [Eff 12/15/95; comp 11/17/97; am and comp 2/16/02; am and comp 11/25/02] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §§103D-104, 103D-305)

§3-131-2 Parceling. (a) Procurements should be done through a competitive process whenever possible. Since there is no definition of artificial division or

intentional division that could address every circumstance, the procurement officer in deciding if a division is artificial or intentional, shall consider the following:

- (1) The higher the price of a group of procurements, the more likely they should be consolidated.
 - (2) The more similar the good, service, or construction, or the more likely it is to purchase a group of goods, services, or construction from one type of vendor, the more likely it should be consolidated.
 - (3) The more foreseeable the procurement of similar goods, services, and construction is, the more likely it should be consolidated.
- (b) In determining whether a competitive sealed process is required and if consolidation is appropriate, the estimated expenditures for any twelve-month period exceeding the dollar limits as stated in section 103D-305, HRS, the competitive sealed process pursuant to subchapter 5 or 6 shall be used to establish a contract.
- (c) A purchasing agency shall, where possible, make appropriate consolidations to obtain competition. The procurement officer shall be responsible for decisions to proceed with small purchase procurements rather than with a competitive sealed process. [Eff 12/15/95; am and comp 11/17/97; am and comp 2/16/02; am and comp 11/25/02] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §103D-305)

§3-131-3 Procurement violations. (a) The head of the purchasing agency is responsible for the agency's compliance with the law. Violations of chapter 103D, HRS, which are normally inadvertent, and the result of administrative error, lack of knowledge, or simple carelessness, may be avoided through the implementation of better procedures, employee training, and progressive discipline.

(b) The procurement officer may prepare a report of procurement violations for review by the reviewing officer. It may be helpful to prepare and maintain procurement violation reports, first, to pinpoint weaknesses in the State's procurement process, including the procurement code itself, and to find ways to improve State procurement, and second, to determine whether or not a violation has reached the level requiring civil or criminal penalties.

(c) Being responsible for the initial investigation of violations requires the head of the purchasing agency to carefully examine the in-place procurement procedures. Any improvements can best be achieved through the agency's own initiative. [Eff 12/15/95; comp 11/17/97; am and comp 2/16/02; am and comp 11/25/02] (Auth: HRS §103D-202) (Imp: HRS §103D-106)

§3-131-4 Civil and criminal penalties. (a) Certain violations of chapter 103D, HRS, may be subject to civil and criminal penalties as described below:

- (1) Civil penalties. A person who contracts for, or purchases goods, services, or construction, in a manner the person knows to be contrary to the requirements of the procurement law is liable for all costs and damages to the State arising out of the violation.
- (2) Criminal penalties. A person who intentionally or knowingly contracts for or purchases goods, services, or construction, under a scheme or artifice to avoid the requirements of the procurement law shall be guilty of a misdemeanor, and in addition to any applicable criminal penalties, shall be subject to removal from office and shall be liable to the State or the appropriate county for any sum paid by it in connection with the violation, and that sum, together with interest and costs, shall be recoverable by the State or county.

(b) In order for civil penalties to apply, a person must have knowingly violated the requirements of the law. In other words, the person committing the violation must be aware that he or she is acting contrary to the requirements of the law at the time the violation occurs. Violations that are the result of administrative error or mistake, ignorance, or carelessness are usually not subject to the civil penalties. The determining factor is what the person understood the procurement requirements to be when the violation occurred, and whether or not the person believed he or she was acting in compliance with those requirements.

(c) In order for criminal penalties to apply, a person must have knowingly or intentionally engaged in a scheme or artifice to avoid the requirements of the

law. The violation must have been committed in a deliberate manner, involving some calculated means, such as parceling for a single procurement, a deliberate misstatement of fact, or an after-the-fact purchase, which is purposefully designed to avoid the requirements of the law. Legally admissible documentary evidence of the wrongdoing must be available to law enforcement authorities in order for criminal prosecution to be undertaken. Law enforcement authorities will also need to determine whether personal gain was intended or involved for either the person committing the violation, a friend or relative of the person, or the vendor, or whether some other vendor was significantly injured, whether intended or not. [Eff 12/15/95; comp 11/17/97; comp 2/16/02; comp 11/25/02] (Auth: HRS §103D-202) (Imp: HRS §103D-106)

§3-131-5 Corrective action. When a purchasing violation has occurred, the head of the purchasing agency shall determine whether any corrective action is necessary to remedy the situation, or prevent its reoccurrence. Action may include training, or a reduction of an employee's purchasing authority. [Eff 12/15/95; comp 11/17/97; comp 2/16/02; comp 11/25/02] (Auth: HRS §103D-202) (Imp: HRS §103D-106)

§3-131-6 Processing procurement violations. (a)
The purchasing agency shall consult with the chief procurement officer on all procurement violations and shall provide the chief procurement officer with a report of findings and corrective actions. The chief procurement officer shall determine whether appropriate corrective actions were taken. The report of findings and corrective actions shall include, at a minimum:

- (1) The facts and circumstances leading to the need for the good or service, including the explanation as to why established procedures were not followed;
- (2) Whether there are any indications of intent to deliberately evade established purchasing procedures;
- (3) Any lack of procurement information or training;
- (4) Whether this is the first occurrence; and
- (5) Whether appropriate written assurance and safeguards have been established to preclude

a subsequent unauthorized procurement.

(b) If the head of the purchasing agency determines that payment to a vendor is also required, the head of the purchasing agency shall include a request for after-the-fact payment approval in the report of findings and corrective actions to the chief financial officer. [Eff 12/15/95; [Eff 12/15/95; comp 11/17/97; am and comp 2/16/02; am and comp 11/25/02] (Auth: HRS §103D-202) (Imp: HRS §103D-106)

§3-131-7 Interim rules. This chapter 131, subtitle 11 of title 3, Hawaii Administrative Rules, replaces rescinded interim rules previously adopted on 2/16/02 (file no. 2449). [Eff 11/25/02]

Amendments to and compilation of chapter 131, title 3, Hawaii Administrative Rules, on the Summary Page dated October 31, 2002 were adopted on October 31, 2002 following a public hearing held on October 16, 2002 in Honolulu, Hawaii; and via video conference from Honolulu, Hawaii on October 16, 2002 to Hilo, Hawaii; Wailuku, Maui; and Lihue, Kauai; after public notice was given in the Honolulu Star-Bulletin, Hawaii Tribune-Herald, West Hawaii Today, The Maui News, and The Garden Island on September 16, 2002.

They shall take effect ten days after filing with the Office of the Lieutenant Governor.

PHYLLIS M. KOIKE
Chairperson
Procurement Policy Board

MARY ALICE EVANS
State Comptroller

APPROVED:

BENJAMIN J. CAYETANO
Governor
State of Hawaii

Dated: _____

Filed

APPROVED AS TO FORM:

Deputy Attorney General